IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14504 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ESSAR POWER LIMITED
Versus
GUJARAT URJA VIKAS NIGAM LTD. AND ANOTHER

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Appearance :
NR MIHIR THAKORE, SENIOR COUNSEL with MR CHHATRAPATI for the petitioner

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 24/07/2006

ORAL JUDGMENT

1. The petitioner – Essar Power Limited is before this Court complaining that respondent No.1 has no power/authority to adjust any amount, which respondent No.2 is to pay to the company in light of Power Purchase

Agreement (PPA) entered into between the then Gujarat Electricity Board and Essar Power Limited. A copy of the agreement is at Annexure-A to this petition.

2. Mr.Mihir Thakore, learned senior counsel appearing with Mr.Chhatrapati for the petitioner invited the attention of the Court to an 'Article' of the PPA, which deals with, "**BILLING AND PAYMENT**". Article 5.1 deals with, "**MODE OF BILLING**". Article 5.2 deals with, "**CONTENTS OF INVOICE**" and Article 5.3 deals with, "**DUE DATE AND PAYMENTS**" and so on and so forth.

The case of the petitioner is that without there being an adjudication of the amount, which is sought to be adjusted by respondent No.1 on behalf of respondent No.2, is not only uncalled for but also arbitrary and hence, liable to be quashed.

3. Learned senior counsel in support of his submissions relied upon a decision of this Court in the matter of **UNITED PHOSPHOROUS LTD. AND ANOTHER VS. GUJARAT ELECTRICITY BOARD AND ANOTHER**, reported in 2005 (0) GLHEL 215831. The learned senior counsel submitted that this Court has held that until an amount, which is sought to be adjusted, is adjudicated as 'payable' by the petitioner company to the respondent, the action of respondent No.1 unilaterally adjusting that amount against the bills payable to the petitioner by respondent

No.1, is not only unjust and arbitrary, but a highhanded action on the part of respondent No.1, who is enjoying monopolistic position and is also being a limb of the State.

The learned senior counsel also relied upon a decision of the Hon'ble the Apex Court in the matter of **UNION OF INDIA VS. RAMAN IRON FOUNDRY**, reported in AIR 1974, S.C. 1265. The learned senior counsel invited the attention of the Court to paragraph Nos.7 and 9 of the judgment to bring home the concept of 'debt' and 'debt due'. Relevant part of paragraph No.9 of the aforesaid judgment reads as under:

> “Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which he appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages.....”
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> “.....It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages

does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.....”

“"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court

> in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant”."
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> (emphasis supplied)

4. The present case has few glaring facts, (1) the relations of the petitioner and respondent No.1 are governed by the 'PPA' entered into between the then Gujarat Electricity Board and the petitioner, (2) no complaint is made though the amount is being adjusted since August, 2004, the details of the same are set out at page No.258, a part of the notice served to respondent No.2 by the petitioner dated April 26, 2006 and (3) it is the case of the petitioner himself, set out in ground No.'C' of the memo of the petition, which will beneficial for ready perusal:

> “(C) The illegal deductions being made by the Respondent No.1 are continuing despite the fact that the dispute as to whether the Petitioner was required to allocate or supply power to the Respondent No.1 and Essar Steel Limited in the ratio of 300:215 at all times, is pending adjudication. The petitioner submits that in fact the Respondent No.1 has in its Petition filed before GERC sought such entitlement to deduct/adjust such amounts. The Petitioner has contended that the GERC has no jurisdiction to entertain and decide the dispute and the said disputes are required to be referred to arbitration in terms of Article 11 of the said PPA, **and the Petitioner has preferred Arbitration**

Petition No.8 of 2006 which has been extensively heard and is pending judgment. In the circumstances, the action of the Respondent No.1 to continue to make deductions is akin to giving a judgment for itself without waiting for the competent legal forum to decide the matter. Such action by a public utility and an instrumentality of the Government of Gujarat is clearly malafide and vexatious and deserves to be quashed and set aside."

(emphasis supplied)

5. The fact that the petitioner has not resorted to any remedy since 2004 till 2006, there is no reason for this Court to entertain this petition more particularly when this very issue is under consideration in two forums where the parties are agitating their claim and those proceedings are at a final stage. The petition is, therefore, dismissed.

(RAVI R.TRIPATHI, J.)

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